COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 18-SC-000534-DE

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH & FAMILY
SERVICES — APPELLANT

v.

On Appeal from Harrison Family Court,
2017-J-00016 & 2017-J-00016-001,
Court of Appeals, 2018-CA-000164

H.C. — APPELLEE

REPLY BRIEF OF COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH & FAMILY SERVICES

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this brief was served on April 25, 2019 by U.S. mail to Samuel P. Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Clerk, Harrison Circuit Court, 115 Joe B. Hall Court #1, Cynthiana, Kentucky, 41031; Joshua McWilliams, McWilliams Law Office, 177 South Main Street, Versailles, Kentucky 40383; and Todd Kellett, P.O. Box 877, Cynthiana, Kentucky 41031. The certified record is sealed, so it was reviewed but not withdrawn.

Johann F. Herklotz

STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT

H.C. should plainly lose on the merits of this appeal. Her response simply reiterates the Court of Appeals' holding without meaningfully responding to the Cabinet's criticisms of it. Regardless, the Court can avoid the merits of this appeal by concluding that H.C. failed to file a timely notice of appeal, which results in "automatic dismissal." *See Excel Energy, Inc. v. Commw. Institutional Secs., Inc.*, 37 S.W.3d 713, 716-17 (Ky. 2000).

H.C. defends her failure to file a notice of appeal within the 30-day time limit set by CR 73.02(1)(a) by arguing that "where an order is not legible, and a trial court agrees, then that excusable neglect under [CR 73.02(1)(d)] has been met." [Resp. at 5]. However, the excusable-neglect requirement in CR 73.02(1)(d) is not a general standard open to interpretation, but instead a specific requirement that lists a single circumstance that qualifies as "excusable neglect." Under CR 73.02(1)(d)'s plain language, the *only* circumstance that suffices to extend the time for taking an appeal is the "failure of a party to learn of the entry of the judgment or an order which affects the running of the time for taking an appeal." *Id.* As Kentucky's highest court long ago held, "[i]t is our opinion that the order purporting to extend the time for taking appeal was invalid because on the face of the record *the sole ground* on which such an order may be granted did not exist." *Fraley v. Rusty Coal Co.*, 399 S.W.2d 479, 481 (Ky. 1966) (emphasis added).

In fact, this Court has rejected the very argument that H.C. advances here—that her miscalculation of the due date for her notice of appeal constitutes "excusable neglect" under CR 73.02(1)(d). In *AK Steel Corp. v. Carico*, 122 S.W.3d 585, 586 (Ky. 2003), this Court held that "a misunderstanding over the filing date is not the type of excusable neglect that would enlarge the time for filing the jurisdictional document after that time expired." H.C.'s response does not even cite *Fraley* or *AK Steel Corp.*, much less try to distinguish them.

Nor can H.C. claim that she satisfies CR 73.02(1)(d) as written. By H.C.'s own admission, she did not "fail[] . . . to learn of the entry of the judgment" as required by CR 73.02(1)(d). She instead claims that she merely misread the entry date on the December 21, 2017 Disposition Order. [Resp. at 5]. Even if this were true (see footnote 1), H.C. concedes that she learned of the December 21, 2017 Disposition Order by January 3, 2018 at the latest—well within the 30-day appeal period. [*Id.* (claiming that H.C. "originally" submitted a notice of appeal on January 3, 2018)]. This, then, is not a situation where a party failed to learn of the entry of judgment. CR 73.02(1)(d) therefore provides no relief to H.C.

H.C. next claims that her alleged attempt to file a notice of appeal on January 3, 2018 somehow forgives her later, untimely notice of appeal.[1] [Resp.

[1] H.C.'s response does not contest the Cabinet's assertion in its opening brief that the January 3, 2018 notice of appeal does not appear to be part of the certified record. [Op. Br. at 10 & n.5]. Moreover, even if the Court considers

at 5]. By H.C.'s telling, the Clerk of the Harrison Circuit Court rejected the January 3, 2018 notice of appeal because "a Motion to Proceed In Forma Pauperis was not included." [*Id.*]. Assuming this is true, H.C.'s response essentially acknowledges that applicable case law holds that, when a party desires to proceed *in forma pauperis*, a motion to proceed *in forma pauperis* must accompany a notice of appeal in order for the latter to be timely filed. [Op. Br. at 11 (collecting cases)]. H.C. asks the Court to reject these decisions, which are unpublished, for the simple reason that, in her view, they are "inequitable and unjust." [Resp. at 5]. But these decisions are persuasive because they track the plain language of CR 73.02(1)(b), which makes clear that both a notice of appeal and a motion to proceed *in forma pauperis* must be tendered in order for the notice of appeal to be timely filed. *See id.* ("If timely tendered *and accompanied by a motion to proceed in forma pauperis supported by an affidavit*, a notice of appeal or cross-appeal shall be considered timely . . . ." (emphasis added)).

Moreover, even though the case law regarding a party's failure to file a motion to proceed *in forma pauperis* with a notice of appeal is unpublished,

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H.C.'s alleged January 3, 2018 notice of appeal, which she attached to her response to the Cabinet's motion for discretionary review, this document refutes H.C.'s contention that she misread the entry date of the December 21, 2017 Disposition Order. That document unequivocally states that "the final disposition order [was] entered on December 21, 2017." [App'x B to H.C.'s Resp. to Cabinet's Motion for Discretionary Review]. Thus, as of January 3, 2018, H.C. was under no illusion about when the Harrison Family Court entered the disposition order.

there is published case law holding that an appellant's failure to include a filing fee with a notice of appeal dictates that the notice of appeal should not be filed. *See, e.g.*, *Excel Energy, Inc.*, 37 S.W.3d at 716; *Bruner v. Sullivan Univ. Sys., Inc.*, 544 S.W.3d 669, 671-72 (Ky. App. 2018). Because a motion to proceed *in forma pauperis* is the analog to a filing fee for an appellant who asserts that she cannot afford a filing fee, this published precedent forecloses H.C.'s argument.

H.C.'s only further rebuttal to the plain language of CR 73.02(1)(b) is that, in her view, "[t]he rule was meant to ensure that a notice of appeal was in the clerk's physical possession within 30 days of an order becoming final." [Resp. at 6]. But the rule makes clear that *both* a notice of appeal *and* a motion to proceed *in forma pauperis* must be filed within 30 days in order for the notice of appeal to be timely filed. *See* CR 73.02(1)(b). CR 73.02(1)(b) is susceptible of no other interpretation.

In arguing that her notice of appeal was timely filed, H.C. also relies upon CR 73.02(2), which states:

> The failure of a party to file timely a notice of appeal, cross-appeal, or motion for discretionary review shall result in a dismissal or denial. Failure to comply with other rules relating to appeals or motions for discretionary review does not affect the validity of the appeal or motion, but is ground for such action as the appellate court deems appropriate . . . .

Id. H.C. references the second sentence of CR 73.02(2) to argue that a remedy short of dismissal of this appeal is appropriate. [Resp. at 6-7]. But that second sentence only apples to "other rules relating to appeals"; the first sentence of

CR 73.02(2) makes clear that its second sentence does not apply to "[t]he failure of a party to file timely a notice of appeal," which is what occurred here. *See Workers' Comp. Bd. v. Siler*, 840 S.W.2d 812, 813 (Ky. 1992) ("Our adoption of the substantial compliance rule provides that the failure of a party to timely complete some procedural steps may not affect the validity of the appeal. However, filing of the Notice of Appeal within the prescribed time frame is still considered mandatory, and failure to do so is fatal to the action." (internal citations omitted)); *see also Norwest Bank Minn., N.A. v. Hurley*, 103 S.W.3d 21, 23-24 (Ky. 2003). More to the point, the need to file a motion to proceed *in forma pauperis* simultaneously with a notice of appeal is part-and-parcel of the timeliness requirement for the notice of appeal; it does not fall under "other rules" so as to implicate the second sentence of CR 73.02(2).

With respect to the merits of this appeal, H.C. argues that the Harrison County Attorney had the authority to bind the Cabinet to its one-page position in the Court of Appeals. H.C. criticizes the Cabinet's opening brief for allegedly failing to cite a "statute or case demonstrating that the Harrison County Attorney, an agent of the Commonwealth, lacks authority to bind the Commonwealth." [Resp. at 7]. But H.C. overlooks the Cabinet's reliance on *D.L. v. Commonwealth*, 2012 WL 5969994 (Ky. App. Nov. 30, 2012) (unpublished) [Tab 9[2]], which granted the Cabinet relief from a position taken by a county

[2] References to "Tab _" in this brief refer to the tabs to the Cabinet's opening brief.

attorney, *id.* at *1-2—the precise situation at issue here. In so doing, *D.L.* summarized the applicable case law as "unequivocally stat[ing] that the Cabinet is a party in dependency proceedings, and that its role extends far beyond the initial filing of the DNA petition." *Id.* at *2 (collecting cases). Also, whether the Harrison County Attorney can bind the Cabinet is merely an academic question. As the Cabinet previously explained, the Harrison County Attorney's brief in the Court of Appeals did not purport to take a position on behalf of the Cabinet, but only on behalf of itself. [Op. Br. at 12].

H.C. also defends the position taken by the Harrison County Attorney because, in her view, it was "meant to minimize the chances a child is removed from its home." [Resp. at 8]. But it is the General Assembly, not the Harrison County Attorney or the Cabinet, that makes policy decisions about the applicable standards governing DNA proceedings. The statutes enacted by the General Assembly do not require the Commonwealth to pay for expert witnesses in DNA proceedings. It is not the Harrison County Attorney's job, nor is it the Cabinet's job, to change the General Assembly's statutory scheme through an *ad hoc* litigation position that is contrary to the applicable statutory framework.

H.C. also accuses the Cabinet of seeking to "stymie an effort to ensure adequate access to counsel." [Resp. at i]. This case, of course, is not about access to counsel, but instead about access to state-funded expert witnesses. The General Assembly has determined that, as a matter of Kentucky law, an

indigent custodial parent is entitled to appointed counsel in a DNA proceeding. KRS 620.100(1)(b). That statutory provision is not at issue here. What is at issue is whether the state must pay for H.C.'s requested expert witness (who apparently would testify that her drug use was not severe enough to affect her ability to parent) in the absence of a Kentucky statute requiring the state to pay for such an expert witness. Whether the state should pay for an expert witness in this circumstance is a question for the General Assembly, not something that a Court should dictate, as Judge Jones put it, by "judicial fiat." [Tab 1 at 12].

H.C.'s response brief also claims that "all three members of the [Court of Appeals] panel agreed that H.C. was entitled to receive the type of funding that she requested." [Resp. at 3]. That mischaracterizes the Court of Appeals' decision. It is more accurate to say that *no* member of the Court of Appeals panel concluded that H.C. is "entitled" to the relief she requested. Judge Jones, of course, concluded in her dissent that "this is a matter that should be addressed by the General Assembly following debate and consideration of funding issues." [Tab 1 at 12]. Judge James Lambert, by contrast, concluded that "due process rights *may* be at stake" and therefore held that "upon a finding by the trial court that such expert funding is reasonably necessary to establish a defense to a DNA petition, funding for such expert fees shall be paid pursuant to KRS 311.110(1)(b) [sic]." [*Id.* at 10 (emphasis added)]. Judge Lambert therefore concluded that H.C. "may" be entitled to relief if she can

make the requisite showing upon remand. And Judge Thompson concurred in that result without an opinion. [*Id.* at 11]. Thus, no member of the Court of Appeals actually concluded that H.C. was "entitled" to a state-funded expert upon remand.

H.C. defends the Court of Appeals' constitutional analysis by claiming that the Court of Appeals relied upon a "very tried and true" test that has been "utilized countless times in judicial proceedings throughout jurisprudence." [Resp. at 10]. It is true that the *Mathews v. Eldridge*, 424 U.S. 319 (1976), balancing test has been applied many times. But neither the Court of Appeals nor H.C. has identified a single instance in which *Mathews* has been applied, as here, to require a state to fund expert witnesses in DNA proceedings in the absence of an applicable statute. In this important respect, the Court of Appeals' constitutional holding appears to be a judicial first that unreasonably extends case law that is far removed from the present situation. H.C.'s response essentially concedes this point.

As to the separation-of-powers problems created by the Court of Appeals' decision, H.C. only offers a half-hearted rebuttal. She acknowledges, as she must, that KRS 31.110 (the funding mechanism that the Court of Appeals presumably intended to accomplish its holding) does not require the Commonwealth to pay for expert-witness fees in DNA proceedings. There is no separation-of-powers issue, H.C. nevertheless argues, because that statute was broadly meant to ensure "a fair process in court." [Resp. at 11]. Even if that

were true, KRS 31.110 *does not apply to DNA proceedings*, but, with very limited exception, only to indigent persons facing criminal prosecution for certain crimes.[3] *See* KRS 31.110(1). The statutory scheme applicable to DNA proceedings, by contrast, merely states that a custodial parent who is indigent is entitled to appointed counsel. KRS 620.100(1)(b) ("The court shall appoint separate counsel for the parent who exercises custodial control or supervision if the parent is unable to afford counsel pursuant to KRS Chapter 31."). The Court of Appeals therefore plainly usurped the General Assembly's legislative prerogative by choosing the funding mechanism for its holding. Judge Jones's conclusion on this point rings true: "[T]his is a matter that should be addressed by the General Assembly following debate and consideration of funding issues. It should not be dealt with by judicial fiat." [Tab 1 at 12].

At the end of her response, H.C. tries to minimize her drug use. She argues that she only "tested positive in one instance for suboxone without producing a prescription, but the levels were extremely low." [Resp. at 12]. She continues that "[f]or every positive test thereafter, Respondent produced prescriptions." [*Id.*]. This takes a one-sided view of the record. During the December 20, 2017 hearing, the Harrison Family Court appeared very concerned about H.C. potentially abusing suboxone (buprenorphine), stating that "[w]hen I have indications that there's a possibility that [suboxone is]

[3] The statute also applies to certain juveniles in a small subset of non-criminal situations. *See* KRS 31.110(4).

being abused, I'm requiring the Vivitrol." [12/20/17 Hearing, at 7:40-7:50]. The Harrison Family Court appeared to further express this concern by stating: "I'm 99 percent certain that if you're using suboxone that you're probably not using it appropriately." [*Id.* at 10:32-10:39]. In any event, all of this is beside the point because H.C. conditionally admitted that her child was an "abused or neglected" child under KRS 600.020(1) (with the condition being her ability to appeal the expert-funding issue). [Tab 2 at 1; Tab 3 at 2]. Thus, the extent of H.C.'s drug use is irrelevant if she does not have a due-process right to state-funded expert testimony in a DNA proceeding.

CONCLUSION

The Court should dismiss this appeal because H.C. did not file a timely notice of appeal. Even if the Court disagrees, it should reverse the Court of Appeals' decision and affirm the Harrison Family Court's judgment. The merits of the Court of Appeals' holding should be debated in a legislative chamber, not in a courtroom.

Respectfully submitted,

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